IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 447 MISC.

WILLIAM VANDERWYDE,

Petitioner,

against

WILFRED L. DENNO, Warden of Sing Sing Prison, Ossining, New York,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, WILLIAM VANDERWYDE, a state prisoner confined in the Death House at Sing Sing Prison, Ossining, New York, prays that this Court grant rehearing of its order of April 12, 1954, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled case as prayed for in the petition filed in this Court on February 27, 1954.

Mr. Justice Black and Mr. Justice Douglas, are of the opinion certiorari should be granted herein. Mr. Justice Jackson took no part in the consideration or decision of the case.

The petitioner was convicted by a special or so-called "blue-ribbon" jury in the Court of General Sessions, New York County, of the crime of Murder in the First Degree and sentenced to suffer the punishment of death. In due course, he filed a petition for a writ of *habeas corpus* in the District Court and prayed for *"a full and complete hearing"* respecting the merits of his petition (Appendix to Appellant's Brief, pp. 3-12).*

Reasons for Granting Rehearing and Issuing the Writ

I.

The petition for certiorari presented a substantial federal question which justified a review of the case.

II.

The claims urged by petitioner were cognizable on habeas corpus, were properly raised by him in all proceedings before the Trial Court, in the New York State Court of Appeals and the Federal District Court was therefore empowered to issue the writ of habeas corpus herein.

It is proper to state that in presenting this application we have clearly in mind the stringent limitations imposed by Rule 33 with reference to petitions for rehearing after denial of certiorari. In view of our belief that the possibility exists that this Court may have overlooked the principles asserted in previous decisions by this Court in *habeas corpus* proceedings and certain of the controlling facts in this case, we are oppressed with a distressing doubt as to whether we have adequately presented the petitioner's contentions in a case in which his life is at stake.

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* References are to the pages of the certified record (Appendix to Appellant's Brief submitted with the petition for certiorari herein).

Our study of the cases in this Court reveals that in a few instances, a successful petition for rehearing did no more than clarify the arguments advanced in the original petition for certiorari (*Hickman* v. *Taylor,* 327 U. S. 808 328 U. S. 876, 329 U. S. 495; *Brinkerhoff-Faris Trust Co.* v. *Hill,* 280 U. S. 604, 550, 281 U. S. 673). These were civil cases. With the delicate duty and grave responsibility resting upon an advocate in a capital case, we crave the further indulgence of this Court for an opportunity to strengthen the petitioner's contentions.

The respondent, in opposition to the petition, argued that the petitioner urged in the Federal courts for the first time his claims that the concept of the special jury as such, the composition of the New York County special jury and the prosecution's records of special jurors are all repugnant to the Constitution of the United States, depriving him of rights under the Fourteenth Amendment (respondent's brief in opposition to certiorari, p. 9).

We disagree with this contention. The validity of the special jury statute (N. Y. Judiciary Law, Section 749-aa, subd. 4) was assailed by petitioner as unconstitutional under the due process clause of the Fourteenth Amendment in all proceedings before the trial court and in the New York State Court of Appeals as shown by the following page references to the certified record of the trial submitted on the petition for certiorari in this case (Notice of Appeal, Rec. 2-4; Endorsement on Indictment reciting the defendant's opposition to the motion for a Special Jury, Rec. 7; 12-17; trial proceedings, Rec. 19-20, 24). The questions were thus raised and considered in the trial court and were raised and considered in the Court of Appeals. The Court of Appeals, in passing upon the contentions of the petitioner, dealt with the questions as Federal questions and decided that no rights of the petitioner under the Fourteenth Amendment had been violated or denied (See *People* v. *Vanderwyde* (1953) remittitur amended, 305 N. Y. 552).

It is clear from the record that the validity of the special jury statute and its construction and application in this case was drawn in question and properly challenged as a violation of petitioner's constitutional rights under the Fourteenth Amendment in the state courts and was explicitly decided below.

We submit that the petitioner had the absolute right in the subsequent *habeas corpus* proceeding to advance different theories or arguments in support of the federal questions actually raised in the state courts and inextricably connected therewith. He was not restrained in the Federal courts to the same arguments which were advanced in the State Courts upon such Federal question. It is stated on this subject with clearness and force by Mr. Justice Peckham in *Dewey* v. *Des Moines,* 173 U. S. 193, 197-8:

> "If the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the personal judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued."

We maintained, among other matters, in our original petition for certiorari that under the command of the statute (28 U. S. C. § 2243), the *petitioner was entitled to a hearing* on the factual issues raised in his petition for a writ of *habeas corpus* relating to:

(a) the statistics contained in the 18th Annual Report (1952) of the Judicial Council of the State of New York in its survey of special juries covering the judicial years 1941 through 1950;

(b) the unfair system in operation with respect to the secret file kept by the prosecutor of the past performances of "repeater" blue ribbon juries.

In *House* v. *Mayo,* 324 U. S. 42, 45, it was held in a *Per Curiam* opinion:

> "Since the petition for habeas corpus was denied without requiring the respondent to answer and without a hearing, we must assume that the petitioner's allegations are true. *Williams* v. *Kaiser,* 323 U. S. 471, 473-474."

We most earnestly submit that the system assailed in our petition pertaining to the prosecutor's use of a secret file containing the records of the past performances of repeater "blue ribbon" jurors violates an accused's right to be tried before an impartial jury. Due process implies and requires trial by an impartial jury and not a packed jury. Yet, under this system a prosecutor can fill the jury box with "repeaters" who are known to him to be convicting jurors. A trial with such concomitants is a mere sham and pretense and as said in *Moore* v. *Dempsey,* 261 U. S. 86, 91, "the whole proceeding is a mask."

Conclusion

For the reasons assigned above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the United States Court of Appeals for the Second Circuit as prayed in the petition.

RUDOLPH STAND,
Counsel for Petitioner.

Certificate of Counsel

The foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

RUDOLPH STAND,
Counsel for Petitioner.